questionnaire he is compelled to complete and submit, his innocence of any wrongdoing.

Even though financial status may reveal ownership of assets unjustified and unaccountable, *People* v. *Connolly*, 253 N. Y. 330, 171 N. E. 393, to require the witness to obtain the same by his own efforts, and to deliver it to the state, as distinguished from the extraction of such information by the oral examination of the witness, or to secure it from other available sources, is to sanction not only self-crimination, but self prosecution.

Application and enforcement of an evidentiary rule thus defined runs counter to the fundamental command of due process that no man shall lose his liberty unless the burden of convincing the factfinder of guilt has been borne by the government.

> *Tot* v. *United States*, 319 U. S. 463, 87 L. ed. 1519, 63 S. Ct. 1241;
>
> *Speiser* v. *Randall*, 357 U. S. 513, 2 L. Ed. 2d 1460, 1472-1473, 78 S. Ct. 1332.

It would constitute such a "* * * procedural device [as] goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established." *Speiser* v. *Randall*, *supra*, p. 1477. Even though it may well be desirable to require public officers and employees to demonstrate themselves to be free of the taint of corruption, to compel them to secure the proofs of their innocence and to submit them to the government is to reverse the procedure by which the investigative processes are conducted. When considered in the light of the fact that no claim is made that any evidence, whatever,

has made the witness suspect, it becomes crystal clear that the presumption of innocence has been abrogated, and a presumption of guilt substituted therefor. Such a course is clearly in conflict with the *ratio decidendi* of the opinions of this court in the *Spaiser* case.

Thus, it appears, the court below has seized upon the absence of any express statutory prohibition to the procedural conduct adopted by the grand jury and by judicial legislation by interpolating an implied permissive authority. The procedural change effected, though assertedly innocuous, would work the complete subversion of that fundamental rule which obliges the state to prove guilt. To permit such a result to masquerade under the guise of a simplification in procedure for the convenience of the state is to subject the form and content of historic liberties and privileges to the "hydraulic pressure" born of the impulse of the moment. *Northern Securities Co. v. United States*, 193 U. S. 197, 400.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

LAWRENCE PEREZ
Counsel for Petitioner

Dated: February 1, 1960.

APPENDIX A

Statutes

AMENDMENT XIV.

Section 1. All persons born or naturalzed in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF CRIMINAL PROCEDURE

Section 248. Evidence receivable before the grand jury

In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other evidence than,

1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence; or

2. The deposition of a witness, in the cases mentioned in the third subdivision of section eight.

Section 249. Same

The grand jury can receive none but legal evidence.

Section 251. Degree of evidence, to warrant an indictment

The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

Section 389. Defendant presumed innocent, until contrary proved. In case of reasonable doubt, entitled to acquittal

A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

JUDICIARY LAW

Section 750. Power of courts to punish for criminal contempts

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * *

3. Wilful disobedience to its lawful mandate.

APPENDIX B

Opinions for Affirmance

STATE OF NEW YORK
COURT OF APPEALS

No. 89.

THE PEOPLE &c. ex rel. GEORGE EDWARD SILLIFANT,
Appellant,

vs.

THE SHERIFF OF THE CITY OF NEW YORK,
Respondent.

DESMOND, *J.*:

We see in this Grand Jury questionnaire procedure no violation of section 248 or section 249 of the Code of Criminal Procedure or of any other law. Relator, an inspector employed by the New York City Department of Buildings, was subpoenaed before the Grand Jury, appeared there and executed a waiver of immunity. After being sworn, he was handed a questionnaire consisting of four pages and was directed by the Grand Jury to take it away with him, fill out the answers in writing, and later to return to the Grand Jury to swear that the answers were true and to be questioned further as to those answers if the Grand Jury should so desire. Relator, on advice of his counsel and on the ground that the Grand Jury

had no such power, refused to do any of this. Later, he refused to comply with a County Court order of compulsion and was found guilty of criminal contempt (Judiciary Law, Sec. 750, subd. 3).

No one doubts that this Grand Jury, investigating alleged bribery and extortion involving public employees, could compel this relator to answer orally the same questions which are printed in the questionnaire (Code Crim. Pro., Sec. 245, 253; see *People v. Connelly*, 253 N.Y. 330). The questions are simple ones asking for details of the income of relator and members of his household, the names of banks in which he and his family have accounts, the existence of safe deposit boxes, life insurance and other policies, stock brokerage accounts and of his charge accounts, if any. The questionnaire calls also for approximate figures of living and personal expenses and for relator's financial balance sheet. No special skill or assistance is necessary for the answering of such questions but they are the sort that a person would not ordinarily be able to answer from unaided memory. Thus it was reasonable and sensible to give relator an opportunity to fill out the answers at a time and place convenient to him after checking his records, etc.

If relator had been called before the Grand Jury and had been questioned orally on these same matters, he undoubtedly would have said that he could not answer from memory. It would then have been appropriate for the Grand Jury to direct him to go to his home or office, assemble the information and come back and testify to it. The same thing is being done here except that he is directed to write out the information on a prescribed form.

Of course, in some other instances oppressive use

of the questionnaire method may be attempted but the courts can deal with that situation when it comes (see *Matter of Cole*, 208 Misc. 697).

BURKE, J. (Concurring):

I agree with Judge Desmond's opinion affirming appellant's conviction for criminal contempt.

On February 2, 1959, pursuant to a direction of a County Judge, the Second Additional Grand Jury of the County of Kings commenced an investigation to determine whether the crimes of bribery and conspiracy were being committed by employees and personnel in the office of the Division of Housing and Division of Buildings of the Department of Buildings of the City of New York in the Borough of Brooklyn, County of Kings. The investigation was prompted by complaints of citizens and reports in the public press that such employees had been guilty of accepting bribes and graft.

There is no question that where there is evidence of corruption that the people of the City of New York are entitled to an accounting by their public servants of the public employees' financial assets for the purpose of ascertaining whether there is graft or corruption or misfeasance in office by these public servants. In the past in the cases of a few individuals, it has been accomplished by oral examination before a Grand Jury.

In this case the appellant is an inspector in the Department, one of approximately 300 employees assigned to duties in the Borough of Brooklyn, County of Kings. He, after signing a waiver of immunity, refused upon the advice of his counsel to fill out and return a financial questionnaire, which as Judge Des-

mond states, consisted of four pages containing simple questions "asking for details of the income of relator and members of his household, the names of banks in which he and his family have accounts, the existence of safe deposit boxes, life insurance and other policies, stock brokerage accounts and charge accounts. After having been adjudged guilty of criminal contempt, fined and sentenced to imprisonment, he sought a writ of habeas corpus which has been denied.

The Grand Jury, he asserts, has not been empowered by the People of the State to compel a public employee to complete and answer a questionnaire in addition to giving oral testimony. The Legislature, it is argued, has provided that the only legal evidence permitted is that secured by legal documentary proof by *records actually in existence*, certain depositions and the oral testimony of witnesses actually produced and sworn (Code of Criminal Procedure, Sec. 248, 249, 392; *City of Buffalo* v. *Hanna Furnace Corp.*, 280 App. Div. 523, rev'd on other grounds, 305 N. Y. 369).

A public employee, therefore, who has obeyed the command of a subpoena, has appeared before the Grand Jury, has permitted himself to be sworn and has agreed to answer all proper questions, *but states he has no financial status records actually in existence*, the appellant concludes, has complied fully with the mandate of the statutes and may not be punished for contempt.

The question to be determined is whether the Grand Jury had the power to direct a witness who has waived immunity, to answer a simple questionnaire dealing with the facts of the financial status of a person which can be answered in a reasonable time without any professional help or advice.

We believe a Grand Jury has such power. No sections of the Code of Criminal Procedure or decision of any appellate court authorizes the suppression of this kind of an inquiry by a Grand Jury.

Since the Grand Jury has the power to investigate corruption, bribery and other crimes committed in the Department of Buildings, the grant of express statutory authority to the Grand Jury imports the existence of implied powers reasonably essential to the *investigation* and *uncovering* of crime and corruption. Obviously, evidence of possession of financial assets or income in amounts not justified or accountable for by salary and other legitimate origins is a pertinent source of inquiry where the misconduct of a public officer is the subject of probe (*People* v. *Connelly*, 253 N. Y. 330). Under such circumstances, to ascertain whether employees of a department accepted bribes, an inquiry into their financial status is a method of procedure reasonably essential to the proper discharge of the Grand Jury's duty to examine into the wilful misconduct of public officials.

Inquiry through the media of questionnaires is a method appropriate to the express power and duty of a Grand Jury to investigate corruption in public office. The best evidence of financial status would be a completed financial questionnaire, prepared by the public officer.

The request to answer a questionnaire in writing violates no fundamental right or prerogative of a witness before the Grand Jury. This Court has sustained convictions of crimes predicated upon financial questionnaires. *People* v. *Workman*, 308 N. Y. 668; *People* v. *O'Brien*, 281 App. Div. 982, affd 305 N. Y. 915; *People* v. *Vigorito*, 284 App. Div. 1043, leave to appeal denied.

The argument that this duty is discharged when he speaks on the witness stand or produces documents already in existence in response to a subpoena *duces tecum* has not been accepted by the Courts. The Courts have the power not only to compel answers from witnesses, but to require them to do things and acts incidental to answers (See *Allen v. State*, 183 Md. 603; 171 A. L. R. p. 1144, et seq.).

It may be that if the questions are too complicated and involved, the witness may attack items on the questionnaire as being an oppressive exercise of the power of a Grand Jury to compel answers thereto (*Matter of Cole* (Reiss) 208 Misc. 703). But the broad powers of a Grand Jury investigating into corruption in public office should not be hampered and curtailed by judicial contentions as to whether it should adopt one approach as distinguished from another.

As the Grand Jury has the right to compel this witness to answer each of these simple questions orally in the presence of the Grand Jury, it has the power in this case to compel him to answer the questions in writing on a brief questionnaire and return it to the Grand Jury and with it to testify orally as to its contents.

The entire procedure from the delivery of the questionnaire to the witness and its return to the Grand Jury with it completed is embraced in the concept of "testimony".

Any suggestion that each one of the 300 employees of the Department of Buildings in the Borough of Brooklyn can be interrogated only orally would be manifestly absurd. If the information was not within the memory of each one of the 300 witnesses then each of them would be required to be excused and

compelled to return at a later date to answer further questions, with further adjournments until the entire investigation would be frustrated and the ends of justice defeated. It would effectively impede the Grand Jury in the discharge of its statutory duty to investigate corruption among public officials.

The procedure adopted by the Grand Jury is logical and equally advantageous to the witness and the Grand Jury. It does not trespass on any fundamental or constitutional rights of the witness or constitute a hardship to the witness.

As the appellant has failed to show that he has been subjected to oppressive process in compelling his testimony, the order appealed from should be affirmed, the petition and writ of habeas corpus dismissed and relator remanded.

CONWAY, *Chief Judge* (dissenting):

The sole issue presented is whether or not the Grand Jury, in the course of a "John Doe" investigation into alleged crimes by the employees of the Department of Buildings of the City of New York, possessed the power to direct an employee of that department to fill out a financial questionnaire outside the grand jury room, submit it completed to the Grand Jury, swearing that his answers contained therein were true, and testify under oath regarding those answers. We have concluded that it is possessed of no such power.

On February 2, 1959, the Second Additional Grand Jury in Kings County began an investigation to determine whether the crimes of bribery and conspiracy were being committed by the personnel of the Division of Housing and Division of Buildings of the Department of Buildings in the County of Kings. The

relator, an inspector of plastering in that department, was, pursuant to a subpoena, summoned as a witness before the Grand Jury. In keeping with appropriate statutes pertaining to waiver of immunity by public employees, Sillifant executed such a waiver (New York City Charter, Sec. 903; New York State Constitution, Article 1, Sec. 6; Penal Law 2446). Upon being sworn by the foreman of the Grand Jury, relator testified, answering all oral questions asked of him. The district attorney then had a financial questionnaire marked in evidence and asked Sillifant if he would be willing to take it home with him, fill it out, return with it to the Grand Jury on a date to be fixed, and swear that his answers contained therein were true. Relator, on the advice of counsel, declined upon the ground that the Grand Jury had no legal power to compel him to complete such questionnaire. The Grand Jury, after voting on the matter, directed relator to complete the document. Sillifant again refused upon the same ground as previously stated. Pursuant to the Grand Jury's direction, the district attorney applied for and obtained a court order to compel relator to comply with the Grand Jury's direction. Upon the relator's refusal to comply with that order he was found guilty of criminal contempt (Judiciary Law, Sec. 750 (3)). A thirty day jail sentence plus a fine of $250 were imposed as a result.

From its inception the Grand Jury has served a twofold purpose: 1) to investigate and uncover crime and corruption; 2) to protect the citizen from unjustified prosecution at the hands of the state (*People* v. *Naughton*, 38 How. Prac. 430, 435-438; *Matter of Funston*, 133 Misc. 620, 621). In carrying out its task of investigating crime and corruption there is no

doubt that the Grand Jury is clothed with wide powers in so far as the scope of its inquiry is concerned (Code Crim. Pro., Sec. 245, 253; 38 C. J. S., Grand Juries, Sec. 34). Nevertheless, that body is dependant for its power and indeed for its very existence upon the Constitution and the Legislature of our State as that body's mandates are manifested by statutory pronouncements in the Code of Criminal Procedure (N. Y. Constit, art. 1, Sec. 6; Code Crim. Pro. Sec. 223-272; *People* v. *Stern*, 3 N. Y. 2d 658, 661; *People* v. *Glen*, 173 N. Y. 395, 400-401; *Matter of Cole*, 208 Misc. 697, 699, 701-702, 703; *People* v. *Brinkman*, 205 Misc. 337, 340-341; *People* v. *Brickner*, — Misc. —, 15 N. Y. S. 528, 530; *Matter of Gardiner*, 31 Misc. 364, 372; see *Matter of Osborne*, 68 Misc. 597, 601, 604; *People* v. *Blair*, — Misc. —, 33 N. Y. S. 2d 183, 189). So it is that the Legislature, in the exercise of its power, has seen fit by section 249 of the Code of Criminal Procedure to limit the evidence receivable by the Grand Jury to "none but legal evidence". Furthermore, by virtue of section 248 of the Code, the Legislature has prescribed the method by which the Grand Jury may receive evidence as follows:

> "In the investigation of a charge for the purpose of an indictment, the Grand Jury can receive *no other evidence than*,
>
> 1. Such as is given by witnesses *produced and sworn* before them, or furnished by legal documentary evidence; or
>
> 2. The deposition of a witness, in cases mentioned in the third subdivision of section eight." (emphasis added)

The answer to the issue presented here depends upon the construction to be placed upon section 248.

Under subdivision 1 of section 248, the Legislature has chosen to use the words "produced *and* sworn" conjunctively not disjunctively. There is nothing in the context of the statute or surrounding circumstances which suggests that the Legislature used the word "and" loosely, inaccurately, or erroneously, that is, that it intended "or" when it said "and". On the contrary, the choice of language utilized clearly imports the appearance of a witness before the Grand Jury, the swearing in of the witness, and the reception of his oral testimony by that body in response to all relevant questions. Any other interpretation would amount to an unjustified enlargement of a statutory provision—in short, to judicial legislation.

The suggestion has been made that the use of financial questionnaire, in the manner in which the Grand Jury attempts to employ it here, is permissible within the meaning of that part of subdivision 1 of section 248 which refers to "legal documentary evidence". However, it is manifest that these words relate to books, records and documents *already in existence* and such as are subject to production pursuant to a subpoena *duces tecum*. The language of the statute may not be twisted so as to include a direction by the Grand Jury to a witness to manufacture or create evidence.

Certainly there is no basis for the utilization of the questionnaire, under subdivision 2 of section 248, as a deposition in place of relator's oral testimony. This is so because a witness' deposition may only be read to a Grand Jury upon a satisfactory showing to the court that he is dead or insane, or cannot with due diligence be found in the state (Code Crim. Pro. Sec.

248 (2), 8 (3)). None of these conditions being present, it follows the Grand Jury was without power to employ a financial questionnaire as a deposition in place of the oral testimony of the relator.

The cases of *People* v. *Workman*, 305 N. Y. 608 and *People* v. *O'Brien*, 305 N. Y. 915, wherein completed financial questionnaires were used as a basis for perjury indictments by the Grand Jury and eventual convictions of that crime, have no application since the question of the power of the Grand Jury to compel the completion of the questionnaire was not presented nor passed upon.

The respondent sheriff urges that we allow the procedure here attempted mainly on the ground that it is expedient in facilitating the Grand Jury in carrying on its investigatory duties. Expediency, however, does not warrant our rewriting a statute. That is for the Legislature. Moreover, were we to agree with respondent's position the door would be opened for the carrying on of Grand Jury investigations by affidavit. The dangers inherent in permitting such a procedure in the absence of a clear legislative mandate are obvious. "We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. * * A community whose judges would be willing to give whatever laws might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established

forms." (per Cardozo, Ch. J., in *Matter of Doyle*, 257 N. Y. 244, 268.).

The decision here does not render impotent the Grand Jury in carrying on its current investigation of alleged corruption in the Department of Buildings in the County of Kings. Methods proven by time and experience to be wholly adequate to obtain the information it seeks here by means of a financial questionnaire are at its disposal. A departure from those methods, such as contemplated in the present case, must find its sanction in a legislative pronouncement.

There is no indication that relator has acted with an intention to impede the Grand Jury's investigation. On the contrary, he responded to the subpoena issued by that body and has been ready and willing, and indeed continued to be ready and willing, to testify orally to any and all relevant questions propounded to him by that body. That is all he is required to do. No oral direction or clarification by the district attorney or the foreman of the Grand Jury can expand or change the command of the subpoena (*Matter of Spector* v. *Allen*, 281 N. Y. 251, 260).

The order of the Appellate Division should be reversed, the writ sustained and the relator released.

* * * *

Order affirmed. Opinion by Desmond, J., in which Dye and Fuld, JJ., concur and in which Burke, J., concurs in a separate opinion. Conway, Ch. J., dissents in an opinion in which Froessel and Van Voorhis, JJ., concur.

(Reported in 6 N. Y. 2d 487, 190 N. Y. S. 2d 641, N. Y. S. 2d Advance Sheets No. 4, October 13, 1959).

APPENDIX C

Judgment Below

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of July in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding

RAYMOND J. CANNON, Clerk

Remittitur July 8, 1959

No. 89

THE PEOPLE &c. ex rel. GEORGE EDWARD SILLIFANT,
Appellant,

vs.

THE SHERIFF OF THE CITY OF NEW YORK,
Respondent.

BE IT REMEMBERED, That on the 7th day of March in the year of our Lord one thousand nine hundred and fifty-nine, George Edward Sillifant, the appellant—in this cause, came here unto the Court of Appeals, by William W. Kleinman and Lawrence Peirez, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in

and for the Second Judicial Department. And The Sheriff of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William W. Kleinman, of counsel for the appellant—, and by Mr. Aaron E. Koota, of counsel for the respondent—, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

WHEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Amendment of Judgment

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A. D. 1959.

Present, HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 568

THE PEOPLE &c. ex rel. GEORGE EDWARD SILLIFANT,
Appellant,

vs.

THE SHERIFF OF THE CITY OF NEW YORK,
Respondent.

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same

hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Appellant contended that the use of the questionnaire during the Grand Jury proceedings was a violation of his rights under the Fourteenth Amendment in that it deprived appellant of due process of law. The Court of Appeals held that appellant was not denied due process under the Fourteenth Amendment.

And the County Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.